Supreme Court, U.S.
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No. 95-1413

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SUSAN D. BIERI
and
LEONARD D. BIERI, III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. THE EIGHTH CIRCUIT COURT OF APPEALS VIOLATED ACCEPTED STANDARDS OF APPELLATE REVIEW BY FAILING TO APPLY THE "CLEARLY ERRONEOUS" STANDARD AND, IN SO DOING, VIOLATED THE DUE PROCESS RIGHTS OF PETITIONERS.

The Government argues that the district court's ruling rested solely upon a "'purported exercise of discretion which did not and does not exist,"' and that the court failed to find that the forfeiture of the farm constituted an excessive fine within the meaning of the Eighth Amendment. *See* Government Brief at 7 (quoting *United States v. Bieri*, 68 F.3d 232 (8th Cir. 1995); *See* Pet. App. at 12). The Government's argument is without merit.

Although the district court did not reiterate the words "excessive fines" when stating its ultimate conclusion, it clearly was applying an excessive fines analysis. If the district court had discarded such an approach in favor of an exercise of unbridled discretion, it would have had no reason to determine the proper test to apply in an excessive fines analysis or to make factual findings relevant to such an analysis. Clearly, the district court articulated the proper test from *United States v. One Parcel of Real Property Located at 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994), and made relevant factual findings.

The Eighth Circuit improperly ignored these findings without finding them to be clearly erroneous. The appellate court's approach violated accepted standards of appellate review and also violated the Bieris' right to due process of law under the Fifth Amendment. The Eighth Circuit's substitute factual findings essentially reflect what that court concluded

from a "cold record"; its findings conflict with those of the district judge who had the opportunity to observe, firsthand, the witnesses and the defendants. As recognized in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), the district court is in a superior position to make factual findings. *Id.* at 574. The district court's expertise and its opportunity to observe the witnesses provide the basis for the traditional deference accorded that court as the trier of fact. *Id.*

In sum, the district court conducted a proper excessive fines analysis and did not simply exercise its discretion. The district court's factual findings correspond with the multi-factor proportionality test articulated in *One Parcel of Real Property Located at 9638 Chicago Heights* and provided the foundation for its ultimate ruling denying the forfeiture of petitioners' farm.

II. THE FORFEITURE OF PETITIONERS' FARM CONSTITUTES AN EXCESSIVE FINE WITHIN THE MEANING OF THE EIGHTH AMENDMENT.

The Government argues that the Eighth Circuit's "fact bound conclusion," which rejected the lower court's denial of forfeiture, is correct and does not warrant review by this Court. The Government's choice of words is revealing, as it acknowledges that the Court of Appeals engaged in a fact-laden analysis and reached a "fact bound" conclusion based on its examination of the record.

The Eighth Circuit's conclusion is erroneous and rests on a highly factual analysis by a court that did not observe, firsthand, the presentation of evidence.

Further, although the Eighth Circuit appeared to adopt a multi-factor, proportionality approach, it distorted the nature of

this approach by according negligible, if any, weight to certain "intangible" factors, such as the property's character as a residence and the effect of the forfeiture on innocent occupants (in this case, young children).

Contrary to the Government's argument, the petitioners' case presents the ideal vehicle for resolving the conflict among the circuits as to which test should be applied to excessiveness challenges under the Eighth Amendment. This case presents the Court with the opportunity to determine whether a multi-factor approach or an instrumentality approach (focusing on the nexus between the criminal activity and the property) should be applied and, further, the degree of importance that should be attached to the various factors enumerated under those tests. In *One Parcel of Real Property Located at 9638 Chicago Heights*, the Eighth Circuit implicitly recognized the sanctity and importance of the family home as a factor to consider in evaluating the excessiveness of a forfeiture. 27 F.3d at 331. Despite this precedent, the Eighth Circuit accorded little importance to the Bieris' claims regarding the intangible value of their property. The question of whether the property's character should be considered in an excessive fines analysis is thus squarely before this Court. This case presents a proper vehicle for this Court to determine what test to properly apply in an excessive fines analysis and to determine the specific factors that must be considered as a part of the test.

CONCLUSION

Based on the foregoing reasons as well as those stated in their Petition for Writ of Certiorari, petitioners respectfully request that this Court grant their petition for writ of certiorari

as to the decision of the Eighth Circuit Court of Appeals in *United States v. Bieri*, Case No. 95-1234WMS.

Respectfully submitted,

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